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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE LUIS SAMAYOA,

Defendant and Appellant.

H044346

(Santa Clara County

Super. Ct. No. F1554476)

Jose Luis Samayoa was sentenced to 30 years, 4 months in prison following his conviction by a jury of first degree robbery in concert (Pen. Code, §§ 211-213, subd. (a)(1)(A)),¹ first degree residential burglary (§§ 459-460, subd. (a)), assault with a firearm (§ 245, subd. (a)(2)), and criminal threats (§ 422).

On appeal, Samayoa argues that the matter must be remanded for the trial court to exercise its discretion to strike the firearm enhancements pursuant to section 12022.53, subdivision (h), as amended by Senate Bill No. 620 (2017-2018 Reg. Sess., Stats. 2017, ch. 682, § 1), and to strike his prior serious felony conviction pursuant to sections 667, subdivision (a) and 1385, subdivision (b), as amended by Senate Bill No. 1393 (2017-2018 Reg. Sess., Stats. 2018, ch. 1013, §§ 1, 2). Samayoa also argues that his sentence for assault with a firearm and criminal threats should have been stayed pursuant to section 654, because the crimes were committed with the same intent as the first degree

¹ All further undesignated statutory references are to the Penal Code.

robbery. Finally, Samayoa requests, and the Attorney General agrees, that we correct the abstract of judgment to accurately reflect the sentence imposed by the trial court.

We conclude that section 654 does not apply to Samayoa's convictions of assault with a firearm and criminal threats. We remand the matter for the trial court to exercise its discretion and determine whether to strike the prior firearm enhancements and the prior serious felony conviction. We also order that the abstract of judgment be corrected to accurately reflect the trial court's sentence.

I. STATEMENT OF THE FACTS AND CASE

On November 18, 2014, Antonio Mallare was in his bedroom in a house he shared with his nephew, Juan Gomez, and his sister, Rosa Gomez. At around 3:45 p.m., Mallare heard noise and opened his bedroom door to see Juan in the hallway being pistol-whipped by a man. Mallare saw another man in the hall whom he recognized as Samayoa, who was a friend of Juan. Samayoa had a gun in the waistband of his pants, and told Mallare to go back into his bedroom and close the door. Five minutes later, Mallare came out of his bedroom and found Juan bleeding and the men gone.

Juan Gomez knew Samayoa because the two had been friends in the past. The friendship ended when Samayoa left his dog with Juan and the dog ran away. After the dog ran away, Samayoa called Juan and threatened him.

On November 18, 2014, Juan came out of his shower and found Samayoa and two other men in his house waving guns. Juan saw Samayoa's gun inside his sleeve. Juan did not remember Samayoa saying anything, but the other men were demanding all the money he had and all of his marijuana. Juan testified that he was pistol-whipped in the back of the head by one of the men who was with Samayoa. Juan had previously stated that Samayoa was the man who had pistol-whipped him. Juan also testified that one of the men said "somebody is gonna get shot." Juan had previously stated that Samayoa had threatened to kill him.

Juan walked down the hall and opened his closet where the marijuana was stored in large garbage bags and gave all of it to the men. In addition to the marijuana, the men took \$2,000 from Juan.

Samayoa was charged by information with first degree robbery in concert (§§ 211-213, subd. (a)(1)(A); count 1); first degree residential burglary (§§ 459-460, subd. (a); count 2); assault with a firearm (§ 245, subd. (a)(2); count 3); and criminal threats (§ 422; count 4). The information also alleged as to each count that Samayoa personally used a handgun within the meaning of sections 12022.53, subdivision (b), or 12022.5, subdivision (a), and that Samayoa had been convicted of a prior crime that was both a serious or violent strike conviction (§§ 1170.12, subd. (b); 667, subds. (b)-(j)), and a prior serious felony conviction (§ 667, subd. (a)(1)).

Samayoa was convicted of all counts following a jury trial. The jury found that the burglary in count 2 was a first degree burglary, and that the firearm enhancements alleged as to counts 1 and 2 were true. The jury found that the firearm enhancements as to counts 3 and 4 were not true. The court found the allegations of the prior serious felony and the prior strike conviction were true.

Following trial, the court granted Samayoa's request to replace his retained counsel with appointed counsel. The court denied Samayoa's motion for a new trial and his *Romero*² motion to strike his prior strike conviction.

The trial court then sentenced Samayoa to a total term of 30 years, 4 months in prison calculated as follows: the middle term of 6 years doubled to 12 years on count 1 (§§ 211-213, subd. (a)(1)(A)); an additional 10 years for the personal use of a firearm enhancement on count 1 (§ 12022.53, subd. (b)); one-third the middle term of 1 year doubled to 2 years on count 3 (§ 245, subd. (a)(2)); one-third the middle term of 8 months doubled to 16 months on count 4 (§ 422); and 5 years for the prior serious felony

² *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

conviction (§ 667, subd. (a)(1)). The court ordered the sentences for counts 3 and 4 to run consecutively, and the sentence for count 2 stayed pursuant to section 654.

Samayoa filed a timely notice of appeal.

II. DISCUSSION

A. Remand for Resentencing

1. Firearm Enhancement Under Section 12022.53, Subdivision (b)

Senate Bill No. 620 (2017-2018 Reg. Sess.), effective January 1, 2018, added the following language to the firearm enhancement provisions in sections 12022.5 and 12022.53: “The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section.” (§§ 12022.5, subd. (c), 12022.53, subd. (h); Stats. 2017, ch. 682, § 1.)

The new legislation granted the trial court discretion to strike firearm enhancements arising under sections 12022.5 and 12022.53. Here, in connection with the first degree robbery conviction (§§ 211-213, subd. (a)(1)(A)), the trial court imposed a mandatory 10-year firearm enhancement under section 12022.53, subdivision (b). Samayoa argues that the amendment to section 12022.53 is retroactively applicable to his case under *In re Estrada* (1965) 63 Cal.2d 740, 745 (*Estrada*), because it potentially mitigates punishment. (See *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091 [applying Sen. Bill No. 620 to case not yet final when law became effective].) The Attorney General concedes that the amendment is retroactive under *Estrada*.

The Attorney General contends, however, that remand for resentencing is not necessary in this case because it would be futile in light of the seriousness of the current offenses and the trial court’s denial of Samayoa’s *Romero* motion to dismiss his prior strike.

Remand for resentencing is necessary when “the record contains no clear indication of an intent by the trial court not to strike one or more of the firearm enhancements” under the amendments effected by Senate Bill No. 620. (*People v.*

McDaniels (2018) 22 Cal.App.5th 420, 448.) Here, at the time of sentencing, the firearm enhancement under section 12022.53, subdivision (b), was mandatory, and the court imposed the enhancement as to the robbery conviction without comment. With regard to the punishment for the underlying offenses themselves, the court imposed the middle term for the first degree robbery conviction, and one-third the middle term for both the assault with a firearm and criminal threats convictions. Given this record, as well as the new sentencing practices created by the amendment to the firearm enhancement statute, we cannot say that the same sentence would have been imposed had the law been as it is now. Accordingly, remand is appropriate.

2. Serious Felony Enhancement Under Section 667, Subdivision (a)

Senate Bill No. 1393 (2017-2018 Reg. Sess.), became effective on January 1, 2019, and gives “courts discretion to dismiss or strike a prior serious felony conviction for sentencing purposes.” (*People v. Garcia* (2018) 28 Cal.App.5th 961, 965, 971 (*Garcia*).)

Here, the trial court found that the prior serious felony conviction pursuant to section 667, subdivision (a), was true and imposed the mandatory consecutive five-year term when it sentenced Samayoa on December 23, 2016. (See *Garcia, supra*, 28 Cal.App.5th at p. 971.) At that time, section 667, subdivision (a), required imposition of prior serious felony enhancements in compliance with section 1385, subdivision (b), which in turn expressly precluded courts from striking prior serious felony convictions for sentencing purposes. (See *People v. Valencia* (1989) 207 Cal.App.3d 1042, 1045-1047.) Senate Bill No. 1393 amended both section 667, subdivision (a) and section 1385, subdivision (b) to delete restrictions on the court’s sentencing discretion to strike prior serious felony convictions for sentencing purposes. (See Stats. 2018, ch. 1013, §§ 1, 2.)

The parties agree that the amendments set forth in Senate Bill No. 1393 apply retroactively to Samayoa’s case. (See *Estrada, supra*, 63 Cal.2d at p. 745; *Garcia, supra*, 28 Cal.App.5th at p. 973.) The Attorney General contends, however, that remand is not

necessary, because the trial court denied Samayoa's *Romero* motion to strike his prior strike conviction and did not impose the mitigated term for the robbery conviction. However, this argument is unpersuasive given that the trial court did not impose the maximum possible sentence in this matter, choosing instead to sentence Samayoa to the middle term for the first degree robbery conviction. Accordingly, we will remand the matter to the trial court for it to exercise its discretion under sections 667, subdivision (a) and 1385, subdivision (b), as amended by Senate Bill No. 1393.

B. Penal Code Section 654

Samayoa argues that the trial court should have stayed his sentence for assault with a firearm and criminal threats pursuant to section 654, because the crimes were committed with the same intent and objective as the first degree robbery and the second degree burglary—to steal Juan's money and marijuana.

Section 654, subdivision (a) provides, in pertinent part, “[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” The statute is intended “to insure that a defendant’s punishment [is] commensurate with his [or her] culpability . . . ,” and bars multiple punishment for both a single act that violates more than one criminal statute and multiple acts, where those acts comprise an indivisible course of conduct incident to a single criminal objective and intent. (*People v. Perez* (1979) 23 Cal.3d 545, 552; *People v. Latimer* (1993) 5 Cal.4th 1203, 1208 (*Latimer*).) Conversely, where a defendant commits multiple criminal offenses during a single course of conduct, he or she may be separately punished for each offense that he or she committed pursuant to a separate intent and objective. (*People v. Beamon* (1973) 8 Cal.3d 625, 637-639.)

The question of whether a course of criminal conduct is divisible within the meaning of section 654 “ ‘depends on the *intent and objective* of the actor. If all of the

offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.’ ” (*Latimer, supra*, 5 Cal.4th at p. 1208.) “In such circumstances, the court must impose but stay execution of sentence on all of the convictions arising out of the course of conduct except for the offense with the longest sentence.” (*People v. McCoy* (2012) 208 Cal.App.4th 1333, 1338.) “The failure of defendant to object on this basis in the trial court does not forfeit the issue on appeal.” (*Ibid.*)

Here, the trial court did not make any express findings regarding the applicability of section 654 to the assault with a firearm and criminal threats convictions. Therefore, we must affirm the trial court’s determination that section 654 does not apply if substantial evidence supports its implicit factual findings. (*People v. Mejia* (2017) 9 Cal.App.5th 1036, 1045.) We presume the existence of every fact the trial court could reasonably determine from the evidence. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.) Whether a defendant harbored a single intent—and thus a single objective—is a factual question. (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

In *People v. Nguyen* (1988) 204 Cal.App.3d 181 (*Nguyen*) the Court of Appeal considered whether a defendant’s act of violence occurring in the commission of a crime could be committed with an intent separate and divisible from the original offense. In *Nguyen*, the defendant and an accomplice entered a market and the accomplice took the victim onto a rear bathroom. After stealing the victim’s property, the accomplice made the victim lie on the floor before kicking him in the ribs and shooting him in the back. (*Id.* at p. 190.) In finding that the robbery and the acts of violence were committed with separate intents, the court stated: “It is one thing to commit a criminal act in order to accomplish another; Penal Code section 654 applies there. But that section cannot, and should not, be stretched to cover gratuitous violence or other criminal acts far beyond those reasonably necessary to accomplish the original offense.” (*Ibid.*) Where a defendant’s initial objective appears to be the taking of another person’s property or

money, evidence of violence or any other conduct by the defendant unnecessary to accomplish the taking may support a finding that the defendant developed a separate and different intent. (*Ibid.*)

Here, it is reasonable to infer that the act of pistol-whipping Juan and the expression of threats to kill him were not done to facilitate the robbery; rather, these crimes, as in *Nguyen*, were independent acts of gratuitous violence. The evidence demonstrates that Samayoa entered Juan's house and demanded his money and marijuana. As Juan was walking down the hallway attempting to comply with Samayoa's demand, he was hit in the back of his head with a gun, and was threatened with death. There is no evidence that Juan was resisting Samayoa's demand for his property such that additional violence would have been necessary to effectuate the theft.

Viewing the record in the light most favorable to the judgment, we find there is substantial evidence that while the purpose of the robbery was to steal Juan's property, the intent effectuated by pistol-whipping and threatening to kill him was separate and divisible from the intent to steal. Therefore, section 654 does not apply to Samayoa's convictions of assault with a firearm and criminal threats.

C. Correction of Abstract of Judgment

Samayoa argues, and the Attorney General agrees, that the abstract of judgment must be corrected to accurately reflect the trial court's sentence. Samayoa was sentenced to one-third the middle term on counts 3 and 4, to run consecutively to any other sentence. The abstract of judgment accurately reflects the sentence for count 3, but does not state that the sentence for count 4 is one-third the middle term. Therefore, the abstract of judgment must be corrected to reflect the accurate sentence for count 4. "Courts may correct clerical errors at any time, and appellate courts . . . that have properly assumed jurisdiction of cases have ordered correction of abstracts of judgment that did not accurately reflect the oral judgments of sentencing courts." (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

III. DISPOSITION

The matter is remanded to the trial court for the limited purpose of resentencing. Upon remand, the court shall hold a resentencing hearing at which it may exercise its discretion to strike the firearm and serious felony enhancements. (§ 12022.53, subdivision (h), as amended by Senate Bill No. 620 (2017-2018 Reg. Sess., Stats. 2017, ch. 682, § 1); §§ 667, subdivision (a) and 1385, subdivision (b), as amended by Senate Bill No. 1393 (2017-2018 Reg. Sess., Stats. 2018, ch. 1013, §§ 1, 2).) If the court strikes any of those enhancements, it shall resentence defendant. If it declines to strike any of the enhancements, it shall reinstate the judgment. The abstract of judgment is ordered corrected to reflect that Samayoa was sentenced to one-third the middle term for count 4. In all other respects, the judgment is affirmed.

Greenwood, P.J.

WE CONCUR:

Bamattre-Manoukian, J.

Danner, J.

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